

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY EDGAR ELLIS,

Defendant-Appellant.

UNPUBLISHED

November 18, 2004

No. 248290

Saginaw Circuit Court

LC No. 02-021746-FC

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, assault with intent to rob while armed, MCL 750.89, intentional discharge of a firearm at an occupied structure, MCL 750.234b, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of eighteen to forty years each for the conspiracy and assault convictions, three to six years for the intentional discharge of a firearm conviction, and 3 to 7-1/2 years for the CCW conviction, to be served consecutive to a two-year prison term for the felony-firearm conviction. He appeals as of right. Because the cited errors of law concerning the sufficiency of the evidence to convict, the admission of evidence, prosecutorial misconduct, and sentencing are without merit, and we have found no errors, let alone errors of consequence that singularly or in combination denied defendant either a fair trial, effective representation, or fair sentence, we affirm.

I

Defendant first argues that the evidence was insufficient to enable a rational trier of fact to find that he was the perpetrator of the charged crimes beyond a reasonable doubt. We disagree.

When reviewing the sufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). All conflicts in the evidence are resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). This Court will not interfere with the jury's role of determining the weight of the

evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992); *Terry*, *supra*.

The evidence at trial established that two men approached the Stop 'N Shop store in Saginaw shortly before 2:00 a.m. on March 17, 2002. The store was closed, but two employees were outside attending to their work. One of the employees, Clayton Jones, observed two men walk around the corner of the store. The taller person pulled out a pistol, demanded money, wrestled with Clayton, and then later shot his pistol into the store several times. The two perpetrators subsequently retreated to the side of the building from where they originally came. Clayton then heard an additional shot and heard someone screaming as if in pain. A right-footed, size-13, Stacy Adams shoe was found near the corner of the Stop 'N Shop after the perpetrators left. Lawrence Jones, the other Stop 'N Shop employee who was outside the store, observed the two perpetrators enter a particular car before leaving the area. A 911 dispatcher received a telephone call from the Stop 'N Shop at 1:52 a.m. At 1:59 a.m., the dispatcher received a telephone call from St. Mary's Hospital in relation to a man arriving with a gunshot wound. The ride from the Stop 'N Shop to St. Mary's Hospital was approximately 3-1/2 minutes in length. The men who arrived at the hospital were defendant and Cyrus Washington. Defendant had a gunshot wound to his leg. It was undisputed that Washington was shorter than defendant. When defendant arrived at the hospital, he was wearing a left-footed, size-13, Stacy Adams shoe. Based on thread wear and pattern, the shoe appeared to be the mate of the shoe found at the Stop 'N Shop store. Defendant's DNA was later positively identified in the shoe recovered from outside the Stop 'N Shop. Further, Lawrence identified the car that appeared at St. Mary's Hospital within minutes after the Stop 'N Shop incident, as the same car that the perpetrators entered after running from the Stop 'N Shop. A gun found on St. Mary's property, in an area where defendant and Washington drove within minutes of the charged crimes, was identified as the weapon that discharged the shell casings recovered from the Stop 'N Shop. Security surveillance tapes demonstrated that no other people, cars, bicycles or motorcycles were observed in the area where the gun was recovered during the relevant time. Additionally, defendant lied to the police about his location at the time of the crime. Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish defendant's identity as a perpetrator of the charged crimes beyond a reasonable doubt.

II

Defendant challenges the admission of codefendant Washington's plea hearing testimony as substantive evidence at trial. He also challenges the trial court's instruction in this regard.

The instructional issue is waived because defense counsel specifically indicated that he had no objection to the instructions given. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). In any event, even if we review these related claims as an unpreserved issue for plain error, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), there was no plain error either in the trial court's admission of the prior testimony as substantive evidence or the court's instruction pertaining to the evidence. The instruction given mirrored CJI2d 4.5, as it existed at the time of defendant's trial. While standard jury instructions are not required and do not have the official sanction of the Michigan Supreme Court, *People v McFall*, 224 Mich App 403, 414; 569 NW2d 828 (1997), defendant does not challenge the standard instruction as misstating the law.

More importantly, Washington's statements at the plea hearing were not hearsay. MCL 801(d)(1)(A) provides:

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, *and* the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of the identification of a person made after perceiving the person.

Washington, the declarant, testified at trial and was subject to cross-examination concerning his statements at the plea hearing. Additionally, the prior statements were made under oath and were subject to the penalty of perjury. Thus, by the plain language of MRE 801(d)(1)(A), the prior statements were not hearsay and, therefore, could properly be used as substantive evidence. See *People v Malone*, 445 Mich 369, 378; 518 NW2d 418 (1994) (statements that are not hearsay under MRE 801(d)(1) may be used as substantive evidence). See also *People v Chavies*, 234 Mich App 274, 281-284; 593 NW2d 655 (1999) (grand jury testimony was admissible as substantive evidence under MRE 801(d)(1)(A)).

We reject defendant's argument that Washington's statements at the plea hearing are not within the scope of MRE 801(d)(1)(A) because no cross-examination took place at the plea hearing. The plain language of MRE 801(d)(1)(A) does not require that the prior statements be subject to cross-examination at the time they were made. See *Malone, supra* at 382. It only requires that the declarant testify at trial and be subject to cross-examination at trial concerning the prior statements. This requirement was satisfied in this case.

We also reject defendant's cursory argument that the evidence was inadmissible under MRE 403. Defendant acknowledges that Washington's prior testimony was probative. MRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or it would result in confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. Relevant considerations in determining unfair prejudice include whether the jury will give the evidence undue or preemptive weight and whether the use of the evidence is inequitable. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). A defendant has a heavy burden of showing that the trial court abused its discretion by declining to exclude testimony on the ground that it would cause unfair prejudice. MRE 403; *People v Houston*, 261 Mich App 463, 467-468; 683 NW2d 192 (2004), lv pending. In this case, defendant does not explain how the challenged evidence was unfairly prejudicial, or rationalize why the evidence should have been excluded under MRE 403. Under the circumstances, plain error in the admission or treatment of the testimony has not been shown.

III

Defendant additionally raises several claims of prosecutorial misconduct. Only some of the claims were preserved with a timely objection at trial. These preserved issues are reviewed by examining the challenged remarks in context to determine whether defendant received a fair

and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). The unpreserved allegations of error are reviewed for plain error affecting defendant's substantial rights. *Id.*

Defendant first argues that the prosecutor argued several facts that were not in evidence. A prosecutor may not argue facts that are not in evidence, nor may he mischaracterize the evidence presented. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). He is, however, accorded great latitude in his argument and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). He may argue the evidence and all reasonable inferences from the evidence as it relates to his theory of the case. *Id.* And, he may appeal to the jury's common sense when arguing that the circumstances surrounding certain testimony renders the testimony believable or not believable. See *People v Fisher*, 220 Mich App 133, 160; 559 NW2d 318 (1996); *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992). Further, prosecutors' rebuttal arguments must be considered in light of defense counsel's arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

We find no merit to defendant's preserved allegations that the prosecutor argued facts not in evidence. Specifically, defendant challenges the prosecutor's rebuttal argument that Colojoneau, who defendant claimed actually committed the crime, would not have left the gun behind or given it to defendant after shooting him. This argument was directly responsive to defense counsel's closing argument suggesting that defendant's version of events was credible. It also appealed to the jury's common sense and was based on defendant's testimony and the reasonable inferences to be drawn from it. Considered in context and in light of the trial testimony, the argument were not improper. *Aldrich, supra*. Moreover, the prosecutor's several rebuttal comments about shoes and shoe sizes were clearly based on the evidence, reasonable inferences, and common sense. They were also responsive to defense counsel's argument. Those comments did not deprive defendant of a fair trial. *Id.*

Defendant next argues that the prosecutor misstated the law by arguing that "all the jury had to do" was determine if defendant was telling the truth. Defendant did not preserve this issue with an appropriate objection at trial. Additionally, defendant's argument is premised on a mischaracterization of the record. The prosecutor did not inform the jury that, in order to decide the case, it simply had to determine whether defendant was telling the truth. Rather, after arguing that the evidence supported defendant's conviction on the charges, the prosecutor reminded the jury that it had heard defendant's story and that it was the arbiter of defendant's credibility with respect to that story. This argument did not constitute a misstatement of the burden of proof. Moreover, the jury was instructed by the trial court that the prosecutor had the burden to prove each element of the crimes charged beyond a reasonable doubt. Thus, the jury was instructed on the proper burden of proof. There was no plain error.

Defendant also argues that the prosecutor committed misconduct by admitting Washington's plea testimony. We conclude that this argument is abandoned. It is presented in a confusing and cursory fashion, and without citation of supporting authority. An appellant may not announce a position and leave it to this Court to discover and rationalize the basis of his claims, nor may he provide cursory treatment with little or no citation of authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Finally, defendant argues that the prosecutor's cumulative misconduct deprived him of a fair trial. Because the allegations of prosecutorial misconduct are without merit, the cumulative effect of the alleged errors did not prejudice defendant or deprive him of a fair trial, and reversal on the ground of cumulative prosecutorial error is not warranted. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

IV

Defendant argues that his eighteen to forty year sentences are illegal because they are significantly higher than the sentence that was initially agreed upon during plea negotiations. He argues that a judge may not impose a harsher sentence on a defendant for exercising his constitutional right to a jury trial.

During plea negotiations, a trial court may, at the request of a party, "state *on the record* the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense." *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). A judge's preliminary evaluation of the case, however, does not bind the judge's sentencing discretion, since additional facts can emerge during later proceedings, in the presentence report, through allocution, or otherwise. *Id.* Courts have vacated sentences that are higher than promised during plea negotiations, but only where the record indicates that the higher sentence was based on a defendant's decision to go to trial. *People v Rivers*, 147 Mich App 56, 60-61; 382 NW2d 731 (1985). Where a sentencing court offers a different reason for the sentence, this Court should not assume that the imposed, higher sentence constitutes a punishment. *Id.* at 61.

In this case, the trial court did not, during plea negotiations, articulate the possible sentence on the record. More importantly, when sentencing defendant, the trial court indicated that it was considering the facts adduced at trial and the information in the presentence report. The court then imposed a sentence within the range recommended by the sentencing guidelines. There is no basis in the record for concluding that the trial court imposed a greater sentence as punishment for defendant exercising his right to a jury trial.

V

Defendant additionally argues that his sentences are disproportionate. The proportionality of defendant's sentences is not subject to review by this Court because defendant was sentenced within the minimum sentence range under the legislative guidelines. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003).

VI

Defendant additionally argues that MCL 769.34(10) is unconstitutional insofar that it requires this Court to affirm a sentence within the sentencing guidelines recommended range. This issue is not preserved because defendant failed to challenge the constitutionality of the statute in the trial court. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). Unpreserved constitutional issues are reviewed for plain error. *Id.*

The first sentence of MCL 769.34(10) provides:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

Defendant's primary argument is that MCL 769.34(10) violates the separation of powers doctrine. This argument was rejected by our Supreme Court in *People v Garza*, 469 Mich 431, 434-435; 670 NW2d 662 (2003), wherein the Court reiterated that the "ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *Id.* at 434. We therefore similarly reject defendant's claims that MCL 769.34(10) violates the separation of powers doctrine and that the Legislature did not have the authority to enact the challenged statute. Further, we find no merit to defendant's argument that *Garza* does not apply to his case. "A decision of the Supreme Court is authoritative with regard to any point decided if the Court's opinion demonstrates 'application of the judicial mind to the precise question adjudged,'" even if it was not necessary to decide the question to decide the case. *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001), quoting *People v Bonoite*, 112 Mich App 167, 171; 315 NW2d 884 (1982). In this case, the question adjudged was actually necessary to a decision of the *Garza* case, and we are therefore bound by the decision.

Defendant additionally argues that MCL 769.34(10) violates Const 1963, art 1, § 20, which provides an accused with the right to appeal from his criminal prosecution. We disagree. The plain language of the challenged statute does not prohibit a defendant from appealing as of right. Nor does it foreclose constitutional or procedural challenges to the sentencing guidelines. It also does not foreclose review of a sentence falling within the legislative guidelines range if the appeal is based on the scoring of the guidelines or the accuracy of the information relied upon at sentencing. The statute only limits the right to appeal a sentence governed by the guidelines if the guidelines were scored correctly and the information utilized at sentencing was accurate. Because the Legislature has the ultimate authority to provide penalties for criminal offenses, *Garza, supra*, and because the right to appeal is not abrogated by the challenged statute, we reject defendant's constitutional challenge.

Finally, defendant raises three other issues with respect to the constitutionality of MCL 769.34(10), specifically that it violates substantive due process, violates procedural due process, and derogates a vested right to appeal. We conclude that these arguments are abandoned because they are raised with little or no citation to relevant authority and because little or no explanation is provided to support and rationalize the positions asserted. *Kelly, supra*.

VII

In a standard 11 brief on appeal, defendant argues that trial counsel was ineffective with respect to waiving defendant's right to an arraignment. Because defendant did not pursue this issue at a *Ginther*¹ hearing, our review is limited to errors apparent on the record. *People v Walter Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). This Court reviews a

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant's challenge to the effective assistance of his counsel to determine whether the defendant has shown that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced the defendant such that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To demonstrate prejudice, a defendant must show that there is a reasonable probability that the result of the proceeding would have been different without counsel's error. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

A defendant may waive his procedural right to an arraignment. MCR 6.113(C) sets forth the requirements for a valid waiver. In this case, defendant's counsel filed a waiver of arraignment, which complied with MCR 6.113(C). The document bears two signatures, one from counsel and one allegedly from defendant.

Defendant's sole argument on appeal is that the waiver document contains his forged signature and that his counsel was ineffective for submitting it and committing a fraud on the trial court. It is not apparent from the record that defendant's signature was forged. A convicted person who attacks the adequacy of his representation must prove his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). He must establish the factual predicate to support his allegations. *Id.* Other than his own, self-serving statement, defendant has offered no testimony or evidence factually supporting his claim that the signature was forged. Defendant has not met his burden of proof with respect to this claim of ineffective assistance of counsel.

IX

Defendant also argues that trial counsel was ineffective for failing to object to the underrepresentation of African-Americans in the jury venire. Once again, because no *Ginther* hearing was held, we review this claim for errors apparent on the record. *Walter Williams, supra.*

Defendant cannot show that counsel's performance fell below an objective standard of reasonableness. In *People v S L Williams*, 241 Mich App 519, 525-526; 616 NW2d 710 (2000), this Court reiterated the necessary requirements for establishing a claim that a defendant was denied the right to an impartial jury drawn from a fair cross-section of the community:

To determine whether a prima facie violation of the fair-cross-section requirement of US Const, Am VI has occurred, the court must find the following (1) the group alleged to be excluded must be a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979); [*People v*] *Hubbard (On Remand)*, [217 Mich App 459, 473; 552 NW2d 493 (1996)].

In this case, it is undisputed that the group alleged to be excluded is a distinctive group in the community, specifically African-Americans. Thus, the first element of the test is met. But the record does not establish either of the other necessary elements. There was no showing that the representation of African-Americans in Saginaw jury venires is not fair and reasonable in

relation to the number of such persons in the community. Defendant points only to the panel that allegedly appeared in his case in arguing that African-Americans are underrepresented. This is insufficient. “Merely showing one case of alleged underrepresentation does not rise to a ‘general’ underrepresentation that is required for establishing a prima facie case.” *S L Williams, supra*, at 526, quoting *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997). In addition defendant has failed to demonstrate that any underrepresentation was due to systematic exclusion. “[A] ‘bald assertion’ that systematic exclusion must have occurred is insufficient to make out a claim of systematic exclusion.” *S L Williams, supra*, at 527, quoting *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). The defendant has the “burden of demonstrating a problem inherent within the selection process that results in systematic exclusion.” *S L Williams, supra*, at 527. Defendant has not demonstrated that any challenge to the underrepresentation of African-Americans on Saginaw juries was meritorious. Thus, he has not met his burden of showing that counsel’s performance fell below an objective standard of reasonableness. *Stanaway, supra*. Further, we deny defendant’s untimely, and unsupported, request for a remand on this issue. See MCR 7.211(C)(1)(a).

X

Finally, defendant argues that the cumulative effect of the errors set forth on appeal requires reversal. The cumulative effect of several minor errors may warrant reversal in some cases even where individual errors in the case would not warrant reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Miller*, 211 Mich App 30, 44; 535 NW2d 518 (1995). In order to reverse on the grounds of cumulative error, the errors must be of consequence. *Cooper, supra*, at 660. The effect of any errors must be seriously prejudicial to warrant a finding that the defendant was deprived of a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). In this case, we have not found any errors of consequence that combined to deny defendant a fair trial.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood